

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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COURT OF APPEALS, DISTRICT OF COLUMBIA.

APRIL TERM, 1922

No. 3844.

912

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN,
AND FRANK WHITE, AS TREASURER OF THE UNITED
STATES OF AMERICA, APPELLANTS,

vs.

FREDERIC SCHUTTE, ADMINISTRATOR OF THE ESTATE
OF CARL SCHUTTE, DECEASED, AND FRITZ SCHUTTE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JULY 12, 1922.

No. 3844.

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TATE OF CARL SCHUTTE, DECEASED, AND FRITZ
SCHUTTE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Original.	Print.
Caption	A	1
Bill of complaint	1	1
Motion to dismiss the bill of complaint	8	5
Entry on overruling defendants' motion to dismiss	9	5
Answer of defendants to the bill of complaint	10	6
Final decree	15	8
Appeal noted by defendants	16	9
Memorandum: Statement of evidence approved and filed	17	9
Assignment of errors	17	9
Designation of record	19	10
Clerk's certificate	20	11
Statement of evidence	21	11
Testimony of Fritz Schutte	22	12

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Supreme Court of the District of Columbia.
 FREDERIC SCHUTTE, ADMINISTRATOR OF THE ESTATE OF
 Carl Schutte, deceased, and Fritz Schutte, plaintiff,
 v.
 THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN,
 and Frank White, as Treasurer of the United States
 of America, defendants.

UNITED STATES OF AMERICA
 District of Columbia ss.
 Be it remembered that in the Supreme Court of the District of
 Columbia, at the city of Washington, in said District, at the times
 hereinafter mentioned, the following papers were filed and proceed-
 ings had, in the above-entitled cause, to wit: That on the 11th day of
 February, 1917, died in Bremen, Germany, leaving a widow and seven children, of
 whom one Carl Johann Schutte also called Frederic and
 Fritz Schutte) was one.

Filed December 14, 1921.
 In the Supreme Court of the District of Columbia.
 FREDERIC SCHUTTE, ADMINISTRATOR OF THE ESTATE OF
 Carl Schutte, deceased, and Fritz Schutte, plaintiffs,
 THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN,
 and Frank White, as Treasurer of the United States
 of America, defendants.

To the Supreme Court of the District of Columbia:
 Plaintiff states as follows:
 (1) That the plaintiff, Frederic Schutte, is a citizen of Germany
 (but has declared his intention to become a citizen of the United
 States), and has since the year 1914 been a resident of the State of
 New York, and that he brings this suit in his right as administrator
 of the estate of Carl Schutte, deceased; the plaintiff, Fritz Schutte, is
 the same person as Frederic Schutte, executor.

(2) On information and belief that Thomas W. Miller, defendant,
 is a citizen of and official of the United States resident within the
 District of Columbia and is now duly qualified as Alien Property
 Custodian, pursuant to the provision of the act of Congress known as
 the "trading with the enemy act," approved October 6, 1917, and is
 acting under the said act and the amendments thereto.

(3) On information and belief that Frank White, defendant,
 is a citizen of and official of the United States resident within
 the District of Columbia and is now duly qualified as Treas-
 urer of the United States under the laws of the United States pro-
 viding for said office and is acting under such laws.

(4) That this suit arises under the laws of the United States and
 that this court has jurisdiction hereof under the said laws and par-
 ticularly under said act of Congress known as the "trading with the
 enemy act," as approved October 6th, 1917, and in particular section
 9 thereof and the amendments thereto.

of New Jersey did forthwith surrender to the District Court of the District of Columbia the said papers and the amendments thereto.

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(5) That on the 10th day of December, 1921, the plaintiff duly filed with the said Alien Property Custodian notice of the claim as herein set forth under oath and in such form and containing such particulars as the said Alien Property Custodian required pursuant to said section 9 of the said act.

(6) That on July 8th, 1904, Carl Schutte, of Bremen, director of the Bremen branch of the Standard Oil Company, deposited for safe-keeping at the New York office of the Standard Oil Company of New Jersey 1,850 shares of the capital stock of the Standard Oil Company of New Jersey of the par value of \$100 per share represented by certificate No. 18870 in the name of Carl Schutte, whereupon the said bailee delivered a receipt to the said Carl Schutte promising to surrender to the said Carl Schutte or his "heirs" the said certificate and shares and accruals thereon, on demand.

(7) That on the 11th day of February, 1917, said Carl Schutte died in Bremen, Germany, leaving a widow and seven children, of whom one Carl Johann Friederic Schutte (also called Frederic and Fritz Schutte) was one.

3 (8) That on the 5th day of July, 1919, letters testamentary were granted to the plaintiff, Frederic Schutte, by the surrogate of the county of New York in pursuance of the laws of the State of New York whereupon the said Frederic Schutte, plaintiff, as administrator, became vested with title to the said 1,850 shares of stock and entitled to the administration of all the decedent's estate lying within the county of New York, and in particular of the said 1,850 shares of stock wrongfully delivered out of the county of New York, and for the due administration of which the plaintiff, Frederic Schutte, administrator, is bound by his administrator's bond, filed with the surrogate, which said shares were on the said 11th day of February, 1917, still for safe keeping at the said offices of the Standard Oil Company of New Jersey in the city of New York.

(9) That the plaintiff, Frederic Schutte, administrator, and the plaintiff, Fritz Schutte, being one and the same natural person, is neither an enemy or ally of enemy of the United States, but has been resident in the United States continuously during the World War as a friend.

(10) But that in disregard of the rights of persons in interest to the estate of Carl Schutte, and in particular Frederic Schutte, now administrator, and Fritz Schutte, plaintiff herein, and their duties, rights, titles, interests, and liabilities imposed by law, and as son of the deceased, the Alien Property Custodian did on the 7th day of August, 1918, determine that the decedent, Carl Schutte, was an alien enemy not holding a license granted by the President and that he resided in Bremen, Germany, and that the said Carl Schutte had due him from the Standard Oil Company of New Jersey the

4 said 1,850 shares of the capital stock of that company, represented by certificate No. 18870, together with all dividends unpaid thereon and thereafter to be paid thereon, but did not serve any demand or requirement with respect thereto on any administrator, or on Fritz Schutte, entitled to letters of administration.

(11) That in pursuance of the demands of the Alien Property Custodian and in obedience thereto the said Standard Oil Company of New Jersey did forthwith surrender to the Bankers Trust Com-

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pany as depositary for the Alien Property Custodian, the said 1,850 shares of stock, together with check in the sum of \$9,250.00; and that, in compliance with further demands of the said Alien Property Custodian, the Standard Oil Company of New Jersey did transfer such shares upon its books and issue a certificate therefor to the Alien Property Custodian and has thereafter paid in to the Alien Property Custodian dividends in the amounts and dates as below set out:

Date.	Per cent.	Amount paid.
Sept. 15, 1918.....	5	\$9, 250. 00
Dec. 15, 1918.....	5	9, 250. 00
March 15, 1919.....	5	9, 250. 00
June 15, 1919.....	5	9, 250. 00
Sept. 15, 1919.....	5	9, 250. 00
Dec. 15, 1919.....	5	9, 250. 00
March 15, 1920.....	5	9, 250. 00
June 15, 1920.....	5	9, 250. 00
Sept. 15, 1920.....	5	9, 250. 00
Dec. 15, 1920.....	5	9, 250. 00
March 15, 1921.....	5	9, 250. 00
June 15, 1921.....	5	9, 250. 00
Sept. 15, 1921.....	5	9, 250. 00
Dec. 15, 1921 *.....	5	9, 250. 00

* The last named dividend has been declared but is not payable until above date, viz, December 15, 1921.

5 (12) But that in fact the said Carl Schutte was not an alien enemy nor was he even in being at the time of the said determination and demand by the Alien Property Custodian, nor were or are sundry distributees and others of the estate of said Carl Schutte alien enemies either under the laws of the United States, the State of New York nor under the "trading with the enemy act," wherefore, the said Frederic Schutte, administrator, being vested with full right, title, and interest, subject to equities of distributees and others, of the said decedent's estate, has been prevented by the said compliance of the said Standard Oil Company of New Jersey with the said erroneous demands and determination of the said Alien Property Custodian from fulfilling his duties as administrator.

(13) That the plaintiff, Fritz Schutte, has certain rights, titles, and interests in and to the said estate of Carl Schutte for that he is a lawful distributee of $\frac{1}{8}$ th of the property of which the decedent, Carl Schutte, died possessed, by reason of which he is entitled to receive from Frederic Schutte, administrator, $\frac{1}{8}$ th of all the estate of the said Carl Schutte remaining after payment of creditors and after reasonable time for administration of the estate.

(14) That these rights, titles, and interests of Fritz Schutte have been disregarded by the seizure of the said estate lying within the State of New York by the said Alien Property Custodian from the said Standard Oil Company of New Jersey, by reason of which Frederic Schutte, administrator, has been prevented and delayed in his administration of the said estate, and will be further prevented and delayed until the said bonds constituting part of the estate of the said Carl Schutte shall be delivered over to Frederic

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Schutte, administrator, for administration, and Fritz Schutte will be delayed in receiving his distributive share until then or until it shall be by this honorable court determined that Fritz Schutte is entitled to receive his said $\frac{1}{8}$ th part of said bonds from the Alien Property Custodian or the Treasurer of the United States of America without such administration.

(15) To the end therefore that the plaintiffs may have such relief as they can obtain only in this honorable court of equity the plaintiff, Frederic Schutte, administrator, prays:

That the Alien Property Custodian of the United States and the Treasurer of the United States, Thomas W. Miller and Frank White, respectively, defendants herein, may be adjudged and decreed to have erroneously and wrongfully secured and detained the said 1,850 shares of stock of the Standard Oil Company of New Jersey and that the said defendants and each of them may be ordered and decreed to return said shares and the dividends thereon and/or the avails and accretions thereon to the said Standard Oil Company of New Jersey at their New York office, the person can place from whom and whence they were taken;

Or that the said defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, may be ordered and decreed to deliver and pay the same aforesaid property and fund to Frederic Schutte, administrator, and that the said Frederic Schutte, administrator, may be adjudged and decreed to be entitled to duly administer same;

And that the plaintiff, Fritz Schutte, prays that he may be adjudged by this honorable court entitled to sole right, title, and interest in and to a $\frac{1}{8}$ th part of the above said property and fund now held by the said Alien Property Custodian and the Treasurer of the United States of America; and that the said defendants and each of them be ordered and decreed to pay over to the said Fritz Schutte, for his own use and benefit, the $\frac{1}{8}$ th part of all said fund and property, or that in lieu of such relief that this honorable court will grant the prayers of the said Frederic Schutte, as administrator;

And that the plaintiffs pray that they may have such further or other general relief in the premises as the nature and circumstances of this case may require and shall to this honorable court seem meet;

And that the plaintiffs pray that the said defendants may be compelled to answer all and singular the premises in this bill (but not under oath, answer under oath hereby waived), and that the court grant the plaintiffs due process by subpoena directed to the said Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, defendants hereinbefore named, requiring and commanding each of them to appear herein to answer this the plaintiff's bill and to stand to, perform, and abide such decree as to this honorable court shall seem meet.

NIPPER & BROWN,
Attorneys for Plaintiff.

DISTRICT OF COLUMBIA,
City of Washington, ss:

I, Fritz Schutte, do make oath and say that I am the plaintiff named in the above bill and have personal knowledge of

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the facts stated therein and that the matters and facts stated in the foregoing bill are true to the best of my knowledge, information, and belief.

Fritz Schutte.

Sworn to and subscribed to before me this 10th day of December, 1921, by Fritz Schutte, to me known and known to me to be the person signing the above instrument.

[SEAL.]

FRANK E. ELDER,
Notary Public.

Motion to dismiss the bill of complaint.

Filed January 13, 1922.

* * * * *

Now come the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, separately and severally moving to dismiss the bill of complaint, and as their separate and several grounds for the said motion assign the following:

(1) That the plaintiff has failed to state facts to show that plaintiff's deceased, Carl Schutte, would have been entitled, if living, to the return of his money or other property hereunder;

(2) That the plaintiff has not stated facts sufficient to entitle him to equitable relief under section 9 of the trading with the enemy act, the amendments thereto, and the proclamations and Executive orders issued thereunder.

9 Wherefore these defendants pray that they may be dismissed with their costs in this behalf expended, and for such other and further relief to which in the premises they may be justly entitled.

PEYTON GORDON,
Attorney of the United States in and for the District of Columbia, Attorney for Thomas M. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

Entry on overruling defendants' motion to dismiss.

Filed February 23, 1922.

* * * * *

This cause coming on for hearing on the motion of the defendants herein to dismiss the bill of complaint in this case, the court, upon due consideration thereof and upon argument of counsel, finds said motion not well taken and hereby overrules the same and defendants are hereby required to answer within ten (10) days.

JENNINGS BAILEY.

FEBRUARY 23, 1922.

No objection as to form.

PEYTON GORDON,
Attorney for defendants,
By VERNON E. WEST,
Asst. United States Attorney.

Answer of defendants to the bill of complaint.

Filed February 27, 1922.

* * * * *

Now come the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, separately and severally answering the bill of complaint, and as their separate and several answers say:

(1) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered 1 of the bill of complaint, and therefore demand strict proof thereof;

(2) They admit the averments of paragraph numbered 2 of the bill of complaint;

(3) They admit the averments of paragraph numbered 3 of the bill of complaint;

(4) The averments of paragraph numbered 4 of the bill of complaint are conclusions of law which these defendants are not required to answer;

(5) They admit the averments of paragraph numbered 5 of the bill of complaint;

(6) Answering the averments of paragraph numbered 6 of the bill of complaint these defendants say that on or about the 21st day of December, 1917, the Standard Oil Company, whose address is 26 Broadway, New York, New York, reported to the Alien Property Custodian that it held 1,850 shares of the common stock of the Standard Oil Company (New Jersey), the registered owner of which was Carl Schutte, Remberte Strausse 18, Bremen, Germany, the par value of such shares of stock being \$100, the said shares being represented by certificate number 18870, and that the said certificate had been in the custody of the said Standard Oil Company for safe keeping since the year 1904.

Further answering the said paragraph, these defendants say that they have no further knowledge or information with respect to the averments of paragraph numbered 6 of the bill of complaint, and therefore demand strict proof thereof;

(7) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered 7 of the bill of complaint, and therefore demand strict proof thereof;

(8) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered 8 of the bill of complaint, and therefore demand strict proof thereof;

(9) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered 9 of the bill of complaint, and therefore demand strict proof thereof;

(10) Answering the averments of paragraph numbered 10 of the bill of complaint, these defendants say that the Alien Property Custodian, acting under and pursuant to the terms and provisions of the trading with the enemy act, the amendments thereto, and the proclamations and Executive orders issued thereunder, after investigation determined that Carl Schutte, whose address is Remberte Strausse 18, Bremen, Germany, was an enemy within the purview and mean-

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ing of the said act, the amendments thereto, and the proclamations and Executive orders issued thereunder, and that 1,850 shares of the capital stock of the Standard Oil Company were owing or belonging to, held for, by, on account of, and for the benefit of the said enemy, and required that the said shares, together with all interest accrued thereon and all dividends and accumulations thereon be conveyed, transferred, assigned, delivered, and/or paid to him as Alien Property Custodian, to be by him held, administered, and accounted for as provided by law. Thereupon the said requirement of the Alien Property Custodian was complied with, and the Alien Property Custodian received the said stock.

Further answering said paragraph these defendants say that subsequent to the receipt by the Alien Property Custodian of the said 1,850 shares of the capital stock of the Standard Oil Company of the par value of \$100 per share the Alien Property Custodian converted the said shares for 7,400 shares of the common capital stock of the Standard Oil Company of New Jersey of the par value of \$25 per share.

Further answering said paragraph, these defendants admit that no demand or requirement of the Alien Property Custodian with respect to the said stock was served upon any administrator or upon Fritz Schutte;

(11) Answering the averments of paragraph numbered 11 of the bill of complaint these defendants say that all the dividends declared and payable upon the aforementioned stock have been paid to the depository of the Alien Property Custodian for the Alien Property Custodian since the date of the requirement of the Alien Property Custodian, to wit, August 7, 1918.

Further answering said paragraph these defendants say that at the hearing of this cause they will render unto this court a full and exact accounting of all the dividends so received by the Alien Property Custodian, to the end that a just and equitable decree may be rendered herein should the plaintiff establish any right to recover.

Further answering the said paragraph these defendants say that at the date of the filing of this answer there has been received by the Alien Property Custodian as dividends, from the aforementioned stock, \$164,010.81;

(12) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered 12 of the bill of complaint, and therefore demand strict proof thereof;

(13) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered 13 of the bill of complaint, and therefore demand strict proof thereof;

(14) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered 14 of the bill of complaint, and therefore demand strict proof thereof;

(15) These defendants deny that the plaintiff herein is entitled to the relief prayed for in paragraph numbered 15 of the bill of complaint.

Wherefore these defendants having fully answered the bill of complaint pray that they be dismissed with their costs in this behalf

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expended, and for such other and further relief to which in the premises they may be justly entitled.

THOMAS W. MILLER,
Alien Property Custodian.

FRANK WHITE,
Treasurer of the United States.

PEYTON GORDON,

Attorney of the United States in and for the District of Columbia, Attorney for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

14 DISTRICT OF COLUMBIA, ss:

Thomas W. Miller, being first duly sworn, upon oath deposes and says that he is Alien Property Custodian of the United States of America; that he has read the foregoing answer by him subscribed and knows the contents thereof; that the matters and things therein stated as of his personal knowledge are true, and those stated as upon information and belief he believes to be true.

THOMAS W. MILLER.

Subscribed and sworn to before me this 18th day of February, 1922.

[SEAL.]

SOPHIE D. HILLMAN,
Notary Public.

DISTRICT OF COLUMBIA, ss:

Frank White, being first duly sworn, upon oath, deposes and says that he is Treasurer of the United States of America; that he has read the foregoing answer by him subscribed and knows the contents thereof; that the matters and things therein stated as of his personal knowledge are true, and those stated as upon information and belief he believes to be true.

FRANK WHITE.

Subscribed and sworn to before me this 20th day of February, 1922.

[SEAL.]

ELLA F. VAN ZANDT,
Notary Public.

15

Final decree.

Filed May 23, 1922.

* * * * *

Upon consideration of the bill of complaint filed herein and the answer filed on behalf of Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, upon all the evidence adduced on behalf of the parties and upon the arguments of counsel for all parties, it is by the court this 23d day of May, 1922,

Adjudged, ordered, and decreed that as to the claim of Fritz Schutte, individually, and/or Frederic Schutte, individually, the bill of complaint be, and the same hereby is, dismissed.

It is further adjudged, ordered, and decreed that upon the execution and delivery of a bond, as hereinafter provided, Thomas W.

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Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, do forthwith convey, transfer, assign, deliver, and/or pay over to Frederic Schutte, as administrator of the estate of Carl Schutte, deceased, those seventy-four hundred (7,400) shares of the capital stock of the Standard Oil Company of New Jersey, of the par value of twenty-five dollars (\$25) per share, being the converted form of one thousand eight hundred and fifty (1,850) shares of the capital stock of the Standard Oil Company of New Jersey, of the par value of one hundred dollars (\$100) per share, represented by certificate No. 18870, in the name of Carl Schutte, and heretofore seized by the Alien Property Custodian pursuant to the terms and provisions of the trading with the enemy act as amended, together with all dividends received by the Alien Property

16 Custodian and/or the Treasurer of the United States upon the said stock.

It is further adjudged, ordered, and decreed that as a condition precedent to the delivery by the Alien Property Custodian of the aforementioned stock and the payment of the dividends accrued thereon there be executed and delivered to the Alien Property Custodian by Frederic Schutte, as administrator of the estate of Carl Schutte, deceased, and a surety company to be approved by this court, a bond in the sum of one million three hundred fifty thousand dollars (\$1,350,000) in favor of Thomas W. Miller, as Alien Property Custodian, and his successors in office; Frank White, as Treasurer of the United States, and his successors in office; and the United States of America, and conditioned upon the return to the Alien Property Custodian, after due administration of the estate of Carl Schutte has been had, of such portion of the aforementioned stock and dividends accrued thereon as shall be determined by the surrogates' court, county of New York, State of New York, to be distributable to persons who, at the date of the signing of this decree, are enemies as defined by the trading with the enemy act as amended.

It is further adjudged, ordered, and decreed that the Alien Property Custodian be allowed proper administrative expenses out of the dividends aforesaid.

A. A. HOEHLING, *Justice.*

17 From the foregoing decree Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, note an appeal in open court to the Court of Appeals of the District of Columbia.

A. A. HOEHLING,
Justice.

MAY 23, 1922.

Memorandum.

June 23, 1922.—Statement of evidence approved and filed.

Assignment of errors.

Filed July 7, 1922.

* * * * *

The defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, assigning error

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in the order of the court and in the final decree of the court entered, respectfully submit that the court erred as follows:

I.

The court erred in overruling the motion to dismiss the bill of complaint.

II.

The court erred in not sustaining the motion to dismiss the bill of complaint.

III.

The court erred in not dismissing the bill of complaint.

18

IV.

The court erred in adjudging, ordering, and decreeing that Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, forthwith convey, transfer, assign, deliver, and/or pay over to Frederic Schutte, as administrator of the estate of Carl Schutte, deceased, those 7,400 (seven thousand four hundred) shares of the capital stock of the Standard Oil Company of New Jersey, of the par value of \$25.00 (twenty-five dollars) a share, being the converted form of 1,850 (one thousand eight hundred and fifty) shares of the common stock of the Standard Oil Company of New Jersey, of the par value of \$100.00 (one hundred dollars) per share, represented by certificate No. 18870 in the name of Carl Schutte, and heretofore seized by the Alien Property Custodian pursuant to the terms and provisions of the trading with the enemy act as amended, together with all dividends received by the Alien Property Custodian, and/or the Treasurer of the United States upon the said stock.

V.

The court erred in not adjudging, ordering, and decreeing that Frederic Schutte, as administrator of the estate of Carl Schutte, deceased, was not entitled to any of the property involved in this suit, and that Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, were entitled to retain possession of the same.

VI.

19 The court erred in refusing to dismiss the bill of complaint.

PEYTON GORDON,
*Attorney of the United States in and for the District
of Columbia, Attorney for the Defendants.*

Designation of Record.

Filed July 7, 1922.

* * * * *

The clerk will please prepare a record on appeal in the above-entitled cause and include therein the following:

1. Bill of complaint.

2. Motion to dismiss.
3. Order overruling motion to dismiss.
4. The answer of the defendants.
5. Final decree and notation of appeal.
6. Assignment of errors.
7. This designation of record.

PEYTON GORDON,
*Attorney of the United States in and for the District
of Columbia, Attorney for the Defendants.*

Service acknowledged this 5th day of July, 1922.

NIPPERT & BROWN,
JOHN WILSON BROWN, III,
Attorneys for the Plaintiffs.

20 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 19, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 39662 in equity, wherein Frederic Schutte administrator of the estate of Carl Schutte, deceased, and Fritz Schutte, is plaintiff, and Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington in said District, this 11th day of July, 1922.

[SEAL.]

MORGAN H. BEACH,
Clerk.

21 In the Supreme Court of the District of Columbia.

Holding an equity court.

FREDERIC SCHUTTE, ADMINISTRATOR OF THE ESTATE OF Carl Schutte, deceased, and Fritz Schutte, plaintiffs, <i>vs.</i> THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, and Frank White, as Treasurer of the United States of America, defendants.	{	No. 39662, In equity.
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Statement of the Evidence.

This cause coming on for hearing before Mr. Justice Hoehling on the — day of May, 1922, the following evidence and testimony was offered by the plaintiffs:

A duly certified copy of the letters of administration upon the estate of Carl Schutte, deceased, granted to Frederic Schutte by the Surrogates' Court of New York County, State of New York, to-

gether with waiver of all right to letters of administration on said estate by E. O. Humbel, representing Louis H. Junod, consul of Switzerland, New York City, in charge of German interests at New York City, and a waiver of all right to letters of administration on said estate by Francis P. Garvan, as Alien Property Custodian, was introduced into evidence.

There was introduced into evidence what purported to be a duly certified certificate of death of Carl Schutte, which was in the German language, and the translation of which is as follows:

22 4721 **CERTIFICATE OF DEATH.** Mr. 647

Name and surname and profession of the deceased: Carl Schutte, private gentleman.

Age: 78 years and 1 month.

Residence: Bremen.

Birthplace: Bremen.

Place of death: Bremen.

Day of death: Eleventh day of February, nineteen hundred and seventeen.

Name and surname and profession of wife: Malvina Elizabeth, nee Focke.

Name and surname and profession: (a) Of the father: Albrecht Nicolaus Schutte, merchant; (b) of the mother: Luise, nee Walte.

Bremen, the 24th of March, 1922.

By (signed) von Uchtrup, Deputy. Attested. Fee: 1 M (SEAL)

Fritz Schutte was called as a witness on behalf of the plaintiffs and testified, upon direct examination, as follows:

"My name is Carl Johann Frederic Schutte, my address is 159 West 80th Street, New York City; I am general manager of the export department in the firm of C. A. Stern & Company, 86 Exchange Place, New York City. I am a resident of New York City and have been such a resident of New York City since 1907. I am the

23 Frederic Schutte named in the letters of administration, duly authenticated copies of which have heretofore been introduced into evidence.

"I am the son of Carl Schutte, whose address was Bremen, Germany, Remberti, No. 18. Carl Schutte's business was for 25 years director of the branch office of the Standard Oil Company, in Bremen, Germany. My father left as property in the State of New York at the time of his death, 1,850 shares of the common stock of the Standard Oil Company of New Jersey; I have received none of this property.

"I was out of the United States the last time in the year 1914, when I attended the golden wedding of my parents, and remained abroad for about four or five weeks; returned to the United States the first days of the month of June, 1914; I have not been outside the United States since; I was not interned during the late war. The President, nor any official acting under him, by proclamation, made me an enemy during the late war. A War Trade Board license was issued to me during the war.

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"None of the 1,850 shares of the capital stock of the Standard Oil Company of New Jersey or the dividends thereof, in the hands of the Alien Property Custodian, have been returned to me."

Upon cross-examination, Mr. Schutte testified as follows:

"My father, Carl Schutte, was not in the United States for fifty years prior to his death; my father was not an American citizen.

24 The trips made by my father to the United States were business trips. I was not the only child of my father at the time of his death; there were six brothers and sisters and myself; these brothers and sisters resided in Bremen, Germany, at the time the United States entered the war in 1917, and they still reside in Germany. There has been no administration of my father's estate in Germany. My father had considerable property in Germany at the time of his death; this property is still in Germany and has been turned over to the heirs; I don't know exactly whether this property has been distributed, but I know it is in charge of the family, my brothers and sisters and mother; most likely they are using the property as their own.

"So far as I know there are no creditors of my father's estate in the United States."

The following questions were then asked on cross-examination and answered by Mr. Schutte.

Q. "The only purpose of taking out administration by you, then, was to secure possession of this property for the purpose of distributing it to yourself and brothers and sisters in Germany?"

A. "Yes; and to do the legal thing."

Q. "Yes; I understand that, but that was the main reason for your getting this administration?"

A. "Yes, sir."

Mr. Schutte further testified as follows:

"There was no other property of my father in the United States at the time of his death, except the 1,850 shares of the common stock of the Standard Oil Company of New Jersey, heretofore referred to."

25 Thereupon the plaintiffs rested, and defendants offered no evidence or testimony.

This is the substance of all of the evidence and testimony at the said hearing.

A. A. HOEHLING,
Justice.

I consent to the statement of evidence as above set forth.

NIPPERT & BROWN,
JOHN WILSON BROWN,
Plaintiff's Attorneys.

39662 Eq. Schutte, administrator, v. Miller. Statement of evidence.

(Indorsed on cover:) District of Columbia Supreme Court. No. 3844. Thomas W. Miller et al., appellants, vs. Frederic Schutte, administrator, etc., et al. Court of Appeals, District of Columbia. Filed July 12, 1922. Henry W. Hodges, clerk.

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clerk

No. 3844.

**In the Court of Appeals of the District of
Columbia.**

APRIL TERM, 1922.

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN,
AND FRANK WHITE, AS TREASURER OF THE UNITED
STATES, APPELLANTS,

v.

FREDERIC SCHUTTE, ADMINISTRATOR OF THE ESTATE
OF CARL SCHUTTE, DECEASED, AND FRITZ SCHUTTE,
APPELLEES.

BRIEF ON BEHALF OF THOMAS W. MILLER, AS ALIEN
PROPERTY CUSTODIAN, AND FRANK WHITE, AS
TREASURER OF THE UNITED STATES.

INDEX.

Statement of the case.....	Page. 1
Assignment of errors.....	3
The issue.....	4
Argument.....	4
Appendix.....	17

TABLE OF CASES.

<i>Keppelmann v. Alien Property Custodian et al.</i> , 108 Atl. 432.....	13
<i>Ramsey, Administrator, v. Alien Property Custodian et al.</i> (no opinion).....	11

TABLE OF STATUTES.

Trading with the enemy act, 40 Stat. L. 411.....	1
Section 7c 40 Stat. L. 411.....	4
Section 7c as amended 40 Stat. L., ch. 201, p. 1020.....	8
Section 9 as amended June 5, 1920, 40 Stat. L. 977.....	17
Section 9d, 40 Stat. L., 977	6
Section 12, 40 Stat. L. 411	15

In the Court of Appeals of the District of Columbia.

APRIL TERM, 1922.

THOMAS W. MILLER, AS ALIEN PROPERTY Custodian, and Frank White, as Treas- urer of the United States, appellants, <i>v.</i> FREDERIC SCHUTTE, ADMINISTRATOR OF the estate of Carl Schutte, deceased, and Fritz Schutte, Appellees.	}	No. 3844.
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**BRIEF ON BEHALF OF THOMAS W. MILLER, AS ALIEN
PROPERTY CUSTODIAN, AND FRANK WHITE, AS
TREASURER OF THE UNITED STATES.**

STATEMENT OF THE CASE.

This suit was instituted in the Supreme Court of the District of Columbia under the terms and provisions of section 9 of the trading with the enemy act, as amended (40 Stat. L. 411; see Appendix).

The appellee sued both in his capacity as administrator of the estate of Carl Schutte, deceased, and in his individual capacity. The purpose of the suit was to recover 1,850 shares of the capital stock of the Standard Oil Company of New Jersey, which had been seized by the Alien Property Custodian as the property of Carl Schutte, an enemy.

The appellee is a citizen of Germany residing in the United States (record, page 1, paragraph 1 of the bill of complaint). On or about the 7th day of August, 1918, the Alien Property Custodian, acting pursuant to the trading with the enemy act, determined that Carl Schutte, the appellee's deceased, was an enemy within the meaning of that act, and that 1,850 shares of the capital stock of the Standard Oil Company of New Jersey, represented by certificate No. 18870, together with all the dividends unpaid thereon, were held for the benefit of the said enemy. Thereupon the Alien Property Custodian required the Standard Oil Company of New Jersey to transfer to him as Alien Property Custodian the said stock as the property of enemies. The requirement of the Alien Property Custodian was duly complied with and he received the stock (record, page 2, paragraphs 10 and 11 of the bill of complaint).

At the time of the seizure of this stock as the property of Carl Schutte, Carl Schutte was not in being, he having died on February 11, 1917, but his death at the time of the seizure was unknown to the Alien Property Custodian (record, page 12). All the heirs and next of kin of Carl Schutte, with the exception of the appellee, are citizens of Germany, residing in Germany where they have always resided. Carl Schutte, the deceased, was, prior to his death, a citizen and resident of Germany (record, page 13). The appellee is a citizen of Germany but resides in the United States.

On July 5, 1919, letters testamentary were granted to the appellee by the surrogate of the county of New York, State of New York (record, page 2, paragraph 8 of the bill of complaint, and pages 11 and 12). There was no other property of Carl Schutte in the United States at the time of his death, except the 1,850 shares of the common stock of the Standard Oil Company of New Jersey, which is the property in controversy in this suit (record, page 13). So far as known, there are no creditors of the estate of Carl Schutte in the United States (record, page 13).

A decree was entered in the Supreme Court of the District of Columbia awarding to the appellee as the administrator of the estate of Carl Schutte the aforementioned stock, but requiring the appellee to deliver to the Alien Property Custodian a bond in the amount of \$1,350,000, conditioned upon the return to the Alien Property Custodian of so much of the said property as the surrogate court of New York should determine was distributable to persons who were enemies under the terms and provisions of the trading with the enemy act (record, page 8).

ASSIGNMENT OF ERRORS.

There are six errors assigned, but several of these are in the alternative, the chief questions raised being the refusal of the court to sustain the motion to dismiss the bill of complaint and its refusal to dismiss the bill of complaint after a hearing on the merits.

THE ISSUE.

The issue of law involved in this case is: Whether in view of the provisions of the trading with the enemy act the appellee as administrator of the estate of Carl Schutte, a German citizen residing in Germany, is entitled to secure possession from the Alien Property Custodian of property seized as the property of Carl Schutte, who was dead at the time of the seizure but all of whose heirs and next of kin, except the appellee, were enemies within the purview and meaning of the trading with the enemy act, as amended.

ARGUMENT.

The property here in controversy came into the possession of the Alien Property Custodian by seizure made by him under the provisions of the trading with the enemy act, as amended. Section 7 (c), as in force at the date of the seizure of this property, provided as follows:

If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian.

Under the provisions of this section the Alien Property Custodian determined that the property was held for the benefit of Carl Schutte, an enemy,

and required it to be transferred to him. This requirement was complied with.

Section 9 of the trading with the enemy act, under which the present suit is brought, makes provision, amongst other things, for the recovery from the Alien Property Custodian by persons not enemies or allies of enemies of property which has been mistakenly seized as the property of an enemy or ally of enemy. Section 9 as amended June 5, 1920, is printed in full in the Appendix hereof. Its general provisions are, however, comparatively simple. It provides that any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him under the terms of the act, and held by him or by the Treasurer of the United States, may file a notice of his claim under oath with the Alien Property Custodian and make application to the President for the return of such property. If the application for the return of the property is unfavorably acted upon, or if not acted upon for a period of sixty days, or if no application is made and the notice of claim is filed, the plaintiff may institute a suit in equity in the district court of the United States for the district in which he resides, or in the Supreme Court of the District of Columbia, to establish his right, title, or interest in the property claimed, and if he succeeds in establishing it the court shall order the delivery to him of the property, or, in the event the subject matter of the suit is

money, the payment of it to him. These are the general provisions of the act to afford relief in the event of property mistakenly seized. Subsection (d) of section 9, however, provides as follows:

Whenever a person, deceased, would have been entitled, if living, to the return of his money or other property hereunder, then his legal representative may proceed for the return of such property as provided in subsection (a) hereof: *Provided, however,* That the President or the court, as the case may be, before granting such relief shall impose such conditions by way of security or otherwise as the President or the court, respectively, shall deem sufficient to insure that such legal representative will redeliver to the Alien Property Custodian such portion of the money or other property so received by him as shall be distributable to any person not eligible as a claimant under subsections (a) or (c) hereof.

The sole question here is whether or not the appellee, as administrator of the estate of Carl Schutte, is entitled to the possession of the entire estate of Carl Schutte in the United States, this entire estate being the 1,850 shares of the common capital stock of the Standard Oil Company of New Jersey, now in the possession of the Alien Property Custodian. The Supreme Court of the District of Columbia held that he was so entitled, provided he gave a bond for \$1,350,000 conditioned upon the return by him to the Alien Property Custodian of so much of the said property as might appear to be distributable to per-

sons who were enemies under the terms and provisions of the trading with the enemy act at the time of the decree. These appellants contend that the appellee, as administrator of the estate of Carl Schutte, is not entitled to the return of this property upon any conditions. It may be that Fritz Schutte, individually, as one of the eight heirs or next of kin of Carl Schutte, is entitled to one-eighth of the property involved. This question, however, is not raised by this appeal. The bill of complaint was dismissed by the Supreme Court of the District of Columbia as to Fritz Schutte individually and no appeal has been taken from that portion of the decree.

The word "enemy" is defined by section 2 of the trading with the enemy act. Subsection (a) of section 2 is as follows:

That the word "enemy" as used herein, shall be deemed to mean, for the purpose of such trading and of this act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

Subsection (c) of section 7 of the act as amended provides as follows:

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him, shall be that provided by the terms of this act; and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

The question then clearly becomes whether or not the appellee, as administrator of the estate of Carl Schutte, can, under the terms and provisions of section 9, recover this property. Subsection (d) of section 9 clearly eliminates the appellee as a claimant under the act. It will be noted that that subsection provides that whenever a person deceased would have been entitled, if living, to the return of his money or other property under the terms of the act, then his legal representative may proceed for the return of such property as provided in subsection (a) of section 9 of the act, provided that the President, in the event of Executive allowance, or the court, in the event of suit, may, before granting such relief, require the claimant, such claimant being a legal representative of the deceased person entitled to recover, to give security to insure the redelivery by such legal repre-

sentative to the Alien Property Custodian of such money or other property so received by him as shall be distributable to any persons not eligible claimants under the act.

It will thus be clearly seen that the intent of the trading-with-the-enemy act was to permit the legal representatives of deceased persons to recover property only for the benefit of persons who were not enemies. Clearly the proviso with respect to security was inserted in the act to enable the Alien Property Custodian to protect any possible part of the property from being distributed to persons who could not have claimed it individually, these persons presumably being unknown at the time of the return to the legal representative, because were they known their interest in the property could be retained by the Alien Property Custodian, and only the beneficial interest of nonenemies be returned. Even were the appellee's deceased entitled to recover under this act, were he living, his legal representative here can not recover the entire amount of the property, because it appears clear from the record of the case that all of the heirs and next of kin of the deceased, with the exception of the appellee, are German citizens residing in Germany, and therefore, under the provisions of section 2 of the act, enemies, and not proper claimants under section 9 (Record, page 13). At most then the claimant here can recover only his interest in the property.

The case against the appellee is still stronger, however. As indicated, subsection (d) of section 9

provides that whenever a person deceased would have been entitled, if living, to the return of his money or property, then the legal representative is entitled to its return. Clearly this is simply another way of saying that if the deceased, if living, would not have been a proper claimant under the act, then his legal representative is not a proper claimant. In the present case Carl Schutte, the deceased, was a citizen of Germany residing in Germany at the time of his death, and had resided in Germany for fifty years prior thereto. (Record, page 2, paragraph 7 of the bill of complaint, and Record, page 13.) The deceased, therefore, if living, would have been an enemy within the meaning of section 2 of the act, and not a proper claimant under section 9. It is difficult, therefore, to see how the appellee, as legal representative of Carl Schutte, can secure the return to him of the property of Carl Schutte in the hands of the Alien Property Custodian.

The evidence shows that this is the only property of Carl Schutte in the United States; that so far as known there are no creditors of the estate in the United States, and that all the heirs and next of kin or beneficial owners of the property, except the appellee individually, are enemies under the terms of the trading-with-the-enemy act. (Record, page 13.) The appellee when asked the question whether or not the only purpose of taking out administration by him was to secure possession of the property for the purpose of distributing it to himself and brothers and

sisters in Germany, answered: "Yes; and to do the legal thing." When asked the further question:

Q. Yes; I understand that, but that was the main reason for your getting this administration?

A. Yes, sir. (Record, page 13.)

It is, therefore, clear, from the the record, that all that the appellee as administrator of the estate of Carl Schutte can do, if he secures possession of this property, is to distribute one-eighth of it to himself and return the remaining seven-eighths to the Alien Property Custodian.

Only one other case involving this question has been decided under the trading-with-the-enemy act. This was the case of *Gordon A. Ramsey, Administrator of the Estate of Kathryn Wundt, deceased, v. Thomas W. Miller, as Alien Property Custodian, et al.*, decided by the District Court of the United States for the Northern District of Illinois. That case was exactly analogous to the present case with the exception that, instead of one of the heirs and next of kin of the deceased residing in the United States, all of the heirs and next of kin resided in Germany and were enemies under the trading-with-the-enemy act. The property in that case was seized by the Alien Property Custodian as the property of Kathryn Wundt, who at the time of the seizure was dead, but all of whose heirs and next of kin resided in Germany and were enemies. There was the additional element, which makes it a stronger case for the Alien Property Custodian in this matter, that there were certain taxes due from the

estate of Kathryn Wundt, and the administrator claimed the right to administer the property for the purpose of paying these taxes. The court, however, held that there was no equity in the plaintiff's bill of complaint and dismissed it. There was no opinion filed in the case but a certified copy of the pleadings, stipulation as to evidence, and the final decree will be produced in court at the oral argument of this case for the information of the court.

Furthermore, it is noted that the appellee was appointed administrator of the estate of Carl Schutte long subsequent to the seizure by the Alien Property Custodian of the property in question. Seven-eighths of the estate here in question is beneficially owned by enemies, subject, of course, to the rights of creditors. There appear, however, to be no creditors of the estate in the United States. It can not be said that the rights of the Alien Property Custodian to the seven-eighths of the property which is clearly beneficially owned by enemies can be defeated by the subsequent appointment of an administrator. Even though the appointment of an administrator ordinarily relates back to the death of the intestate, it never relates back to the prejudice of intervening rights. In this case the rights of the Alien Property Custodian intervene. It is the beneficial ownership of property which is the test of the enemy character thereof. As provided in section 7 (c) of the act quoted above, the President, who has delegated his rights to the Alien Property Custodian, may require any money or other property owing or belonging to, held for, by, on ac-

count of, or on behalf of, or for the benefit of, an enemy. This includes the right to require the transfer to him of the enemy interest in property held in trust.

The fact that the equitable title to property may be seized by the Alien Property Custodian, if owned by enemies, was held in the case of *Keppelmann et al. v. Alien Property Custodian* by the New Jersey Court of Errors and Appeals, 108 Atl. 432. In that case this question was raised, and the court said:

The manifest purpose of Congress was that the statute should operate not only upon property the legal title to which is in the alien, but on all property held for him, or for his benefit, whether the legal title be in him or in the person who holds it for his benefit. In the present case the property is held in trust by the complainants solely for the benefit of these three daughters of the testator, and comes within the very words of the statute, for although they are not the holders of the legal title to the trust estate, they are the equitable owners thereof, the whole beneficial interest being lodged in them.

The Keppelmann case is peculiarly analogous to the case at bar, the only difference being that in the Keppelmann case a trustee was a plaintiff and in the case at bar the administrator was the plaintiff. In that case certain property in the possession of a trustee under the will of a deceased person was demanded by the Alien Property Custodian as beneficially owned by enemies. One of the questions raised was whether or not the trustee could be required to deliver the prop-

erty to the Alien Property Custodian unless and until the custodian executed and delivered to them a proper refunding bond in accordance with the New Jersey statute. In that connection the court held:

We have no doubt as to the duty of the complainants. War having been declared, everything necessary to be done for the preservation of the Nation and to make the war effective was within the power of Congress. That body deemed it necessary, among other things, to take possession of all property of alien enemies located in this country, and so prevent its use by the enemy for purposes inimical to our own safety. This and all other war measures enacted by Congress necessarily override State statutes in conflict therewith.

So, too, every State law that imposes limitations upon the scope of the Federal legislation must give way to it, provided that such an intent is to be gathered from the enactment. In the present case such intent is apparent, for Congress has declared in section 7 (c) of the trading with the enemy act that any payment, conveyance, transfer, assignment, or delivery of money or property to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of of the same.

This situation is strikingly analogous to the situation in the present case. Under the facts as proved at the hearing the only apparent purpose of the administration here is to distribute the property. The only

possible nonenemy distributee of the property, the deceased having died intestate, is the appellee herein, and he is entitled only to one-eighth thereof. Following the decision in the Ramsey case, *supra*, the bill of complaint should have been dismissed with respect to the seven-eighths of the property, the beneficial ownership of which is clearly in enemies. The Alien Property Custodian has full power under the trading with the enemy act to administer property, section 12 thereof as amended providing as follows:

The Alien Property Custodian shall be vested with all of the powers of a common-law trustee in respect of all property other than money which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof.

There is no necessity, therefore, under the facts of the present case, for the property to be returned to an administrator simply to permit him to distribute

one-eighth of it to himself and return the other seven-eighths to the Alien Property Custodian. A court of equity will not permit such circuitry of action.

The decree of the Supreme Court of the District of Columbia should be reversed and the bill of complaint dismissed.

Respectfully submitted.

PEYTON GORDON,

Attorney of the United States

in and for the District of Columbia,

DEAN HILL STANLEY,

Special Assistant to the Attorney General.

Attorneys for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

APPENDIX A.

[PUBLIC—No. 252—66TH CONGRESS.]

[H. R. 14208.]

An Act To amend section 9 of an act entitled "An act to define, regulate, and punish trading with the enemy, and for other purposes," approved October 6, 1917, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 9 of an act entitled "An act to define, regulate, and punish trading with the enemy, and for other purposes," approved October 6, 1917, as amended, be, and hereby is, amended so as to read as follows:

"SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may

order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this act, and until any final judgment or decree which shall be

entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

“(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was—

“(1) A citizen or subject of any nation or State or free city other than Germany or Austria or Hungary or Austria-Hungary, and is at the time of the return of such money or other property hereunder a citizen or subject of any such nation or State or free city; or

“(2) A woman who at the time of her marriage was a subject or citizen of a nation which has remained neutral in the war, or of a nation which was associated with the United States in the prosecution of said war, and who prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary and that the money or other property concerned was not acquired by such woman either directly or indirectly from any subject or citizen of Germany or Austria-Hungary; or

"(3) A woman who at the time of her marriage was a citizen of the United States (said citizenship having been acquired by birth in the United States), and who prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary, and that the money or other property concerned was not acquired by such woman either directly or indirectly from any subject or citizen of Germany or Austria-Hungary; or

"(4) A citizen or subject of Germany or Austria or Hungary or Austria-Hungary and was, at the time of the severance of diplomatic relations between the United States and such nations, respectively, accredited to the United States as a diplomatic or consular officer of any such nation, or the wife or minor child of such officer, and that the money or other property concerned was within the territory of the United States by reason of the service of such officer in such capacity; or

"(5) A citizen or subject of Germany or Austria-Hungary, who by virtue of the provisions of sections 4067, 4068, 4069, and 4070 of the Revised Statutes, and of the proclamations and regulations thereunder, was transferred, after arrest, into the custody of the War Department of the United States for detention during the war and is at the time of the return of his money or other property hereunder living within the United States; or

"(6) A partnership, association, or other unincorporated body of individuals outside the United States, or a corporation incorporated within any country other than the United States, and was entirely owned at such time by subjects or citizens of nations, States, or free cities other than Germany or Austria or Hungary or Austria-Hungary and is so

owned at the time of the return of its money or other property hereunder; or

“(7) The Government of Bulgaria or Turkey, or any political or municipal subdivision thereof; or

“(8) The Government of Germany or Austria or Hungary or Austria-Hungary, and that the money or other property concerned was the diplomatic or consular property of such Government—

then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine, such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian: *Provided*, That no person shall be deemed or held to be a citizen or subject of Germany or Austria or Hungary or Austria-Hungary for the purposes of this section, even though he was such citizen or subject at the time first specified in this subsection, if he has become or shall become, ipso facto or through exercise of option, a citizen or subject of any nation or State or free city other than Germany, Austria, or Hungary (first) under the terms of such treaties of peace as have been or may be concluded subsequent to November 11, 1918, between Germany or Austria or Hungary (of the one part) and the United States and/or three or more of the following-named powers: The British Empire, France, Italy, and Japan (of the other part), or (second) under the terms of such treaties as have been or may be concluded in pursuance of the treaties of peace

aforesaid between any nation, State, or free city (of the one part) whose territories, in whole or in part, on August 4, 1914, formed a portion of the territory of Germany or Austria-Hungary and the United States and/or three or more of the following-named powers: The British Empire, France, Italy, and Japan (of the other part). For the purposes of this section any citizen or subject of a State or free city which at the time of the proposed return of money or other property of such citizen or subject hereunder forms a part of the territory or any one of the following nations: Germany, Austria, or Hungary, shall be deemed to be a citizen or subject of such nation. And the receipt of the said owner or of the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian shall be a full acquittance and discharge of the Alien Property Custodian or the Treasurer of the United States, as the case may be, and of the United States in respect to all claims of all persons heretofore or hereafter claiming any right, title, or interest in said property, or compensation or damages arising from the capture of such property by the President or the Alien Property Custodian: *Provided further, however,* That except as herein provided no such action by the President shall bar any person from the prosecution of any suit at law or in equity to establish any right, title, or interest which he may have therein.

“(c) Any person whose property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or

may institute suit in equity to recover such property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof.

“(d) Whenever a person, deceased, would have been entitled, if living, to the return of his money or other property hereunder, then his legal representative may proceed for the return of such property as provided in subsection (a) hereof: *Provided, however,* That the President or the court, as the case may be, before granting such relief shall impose such conditions by way of security or otherwise, as the President or the court, respectively, shall deem sufficient to insure that such legal representative will redeliver to the Alien Property Custodian such portion of the money or other property so received by him as shall be distributable to any person not eligible as a claimant under subsections (a) or (c) hereof.

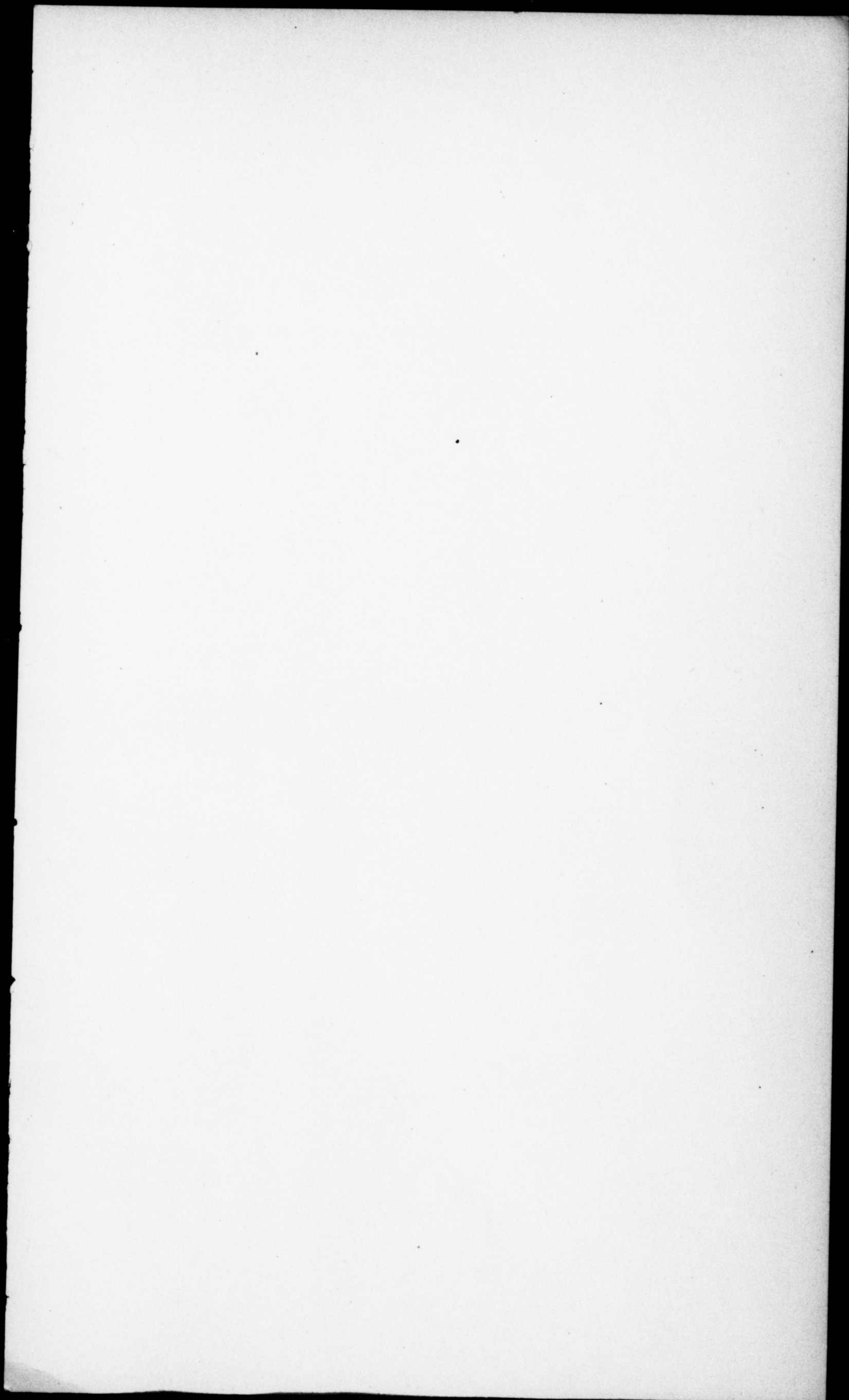
“(e) No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder.

“(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

“(g) This section shall not apply, however, to money paid to the Alien Property Custodian under section 10 hereof.”

Approved June 5, 1920.

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COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

IN THE

By C. A. Hodges
Court of Appeals, District of Columbia.

APRIL TERM, 1922.

No. 3844.

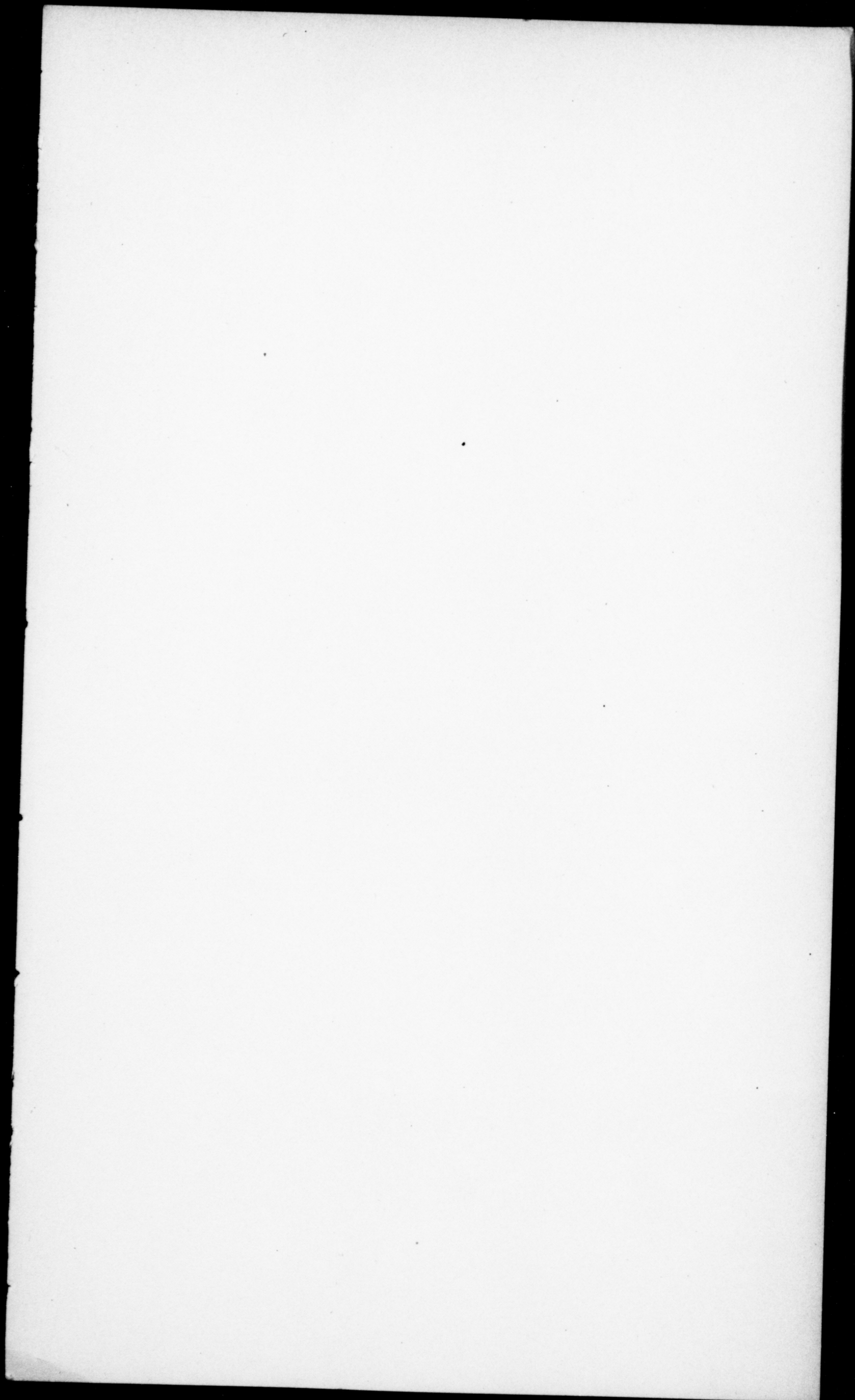
THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN,
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vs.

FREDERICK SCHUTTE, ADMINISTRATOR OF THE ESTATE
OF CARL SCHUTTE, DECEASED, AND FRITZ SCHUTTE,
APPELLEES.

BRIEF FOR APPELLEES.

ALFRED K. NIPPERT,
JOHN WILSON BROWN, III,
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BRIEF FOR APPELLEES.

Statement of the Case.

To the statement of the case as presented by the appellants we would add the following: That Schutte, appellee, has been a resident of the city and State of New York since 1907 and at no time an enemy or ally of enemy (R., 12, cap. 23); he is a son of the deceased, Carl Schutte, and distributee of

at least one-eighth of the decedent's estate, including the property in controversy (R., 13, cap. 24), but has received none thereof (R., 12, cap. 23, 24); letters of administration were granted Schutte after production of written waiver of Alien Property Custodian to any right of letters (R., 12, cap. 21).

The Issue.

The appellees concede for the purpose of this argument the validity of the Custodian's seizure of the property in controversy, and that the intent of the Trading with the Enemy Act is to permit no recovery under section 9 for the benefit of enemies, and that the sole remedy of Schutte lies under said section 9. It is likewise conceded that such interest as the Alien Property Custodian has in such part of the property in controversy beneficially enemy-owned is in nowise altered by the subsequent appointment of an administrator.

The appellees therefore appear to take material issue with the appellants' brief only on one point: Whether the clause,

"That any person not an enemy or ally of enemy claiming any interest, right or title in any money or other property which may have been conveyed * * * to the Alien Property Custodian * * * may institute a suit * * * to establish the interest, title or debt so claimed * * *"—Trading with the Enemy Act, sec. 9 (a).

is limited by the clause,

"Whenever a person, deceased, would have been entitled, if living, to the return of his money or other property hereunder, then his legal representative may proceed for the return of such property * * *"—Trading with the Enemy Act, sec. 9 (d).

in which case, as the appellant contends, no administrator of a German deceased before the war would be a proper claimant, irrespective of nationality of beneficiaries.

The appellees also not only disagree with the appellants' contention that the decree as rendered might have been in other and better form, but maintain that if this were a fact unless error is shown in decree as rendered such question is not reviewable.

ARGUMENT.

SECTION 9 (d) OF THE TRADING WITH THE ENEMY ACT IS IN EXTENSION OF 9 (a) AND NOT IN LIMITATION THEREOF.

The amendment of June 5, 1920, to section 9 carried over *verbatim* the entire provisions of remedy of old section 9 and denoted this section 9 (a). Old section 9 and the new section 9 (a) provide:

"That any person not an enemy or ally of enemy claiming any interest, right or title in any money or other property which may have been conveyed * * * to the Alien Property Custodian * * * may institute a suit * * * to establish the interest, title or debt so claimed * * *"—Trading with the Enemy Act, sect. 9 (a), amended (sec. 9, old).

The provisions of old section 9, now section 9 (a), were held so exhaustive as to offer sufficient remedy for every right of any person interfered with by the operation of the act and held the act constitutional in its seizure provisions on the strength of this universal remedy provided.

"If Congress had intended to diminish the jurisdiction of courts of equity in regard to claims arising under section 9 it must be assumed that such intent would have been plainly manifested."—*Spiegelberg v. Garvan*, 260 Fed., 302.

"Section nine gives a right of action in the District Court to all claimants, not enemies. * * * As the capture is in no sense a condemnation but merely a sequestration, section 9 furnishes complete relief to all who come within its terms."—*Kohn v. Garvan*, 263 Fed., 909.

"There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized * * * The present Act commits the determination of that question to the President * * * but it does not make his action final. On the contrary it distinctly reserves to any claimant who is neither an enemy or an ally of enemy a right to assert and establish his claim by a suit in equity unembarrassed by the precedent executive determination."—*Stoehr v. Garvan*, 255 U. S., 239.

Our opponents contend that this amendment which left section 9 intact *verbatim* as section 9 (a) was limited by section 9 (d) of the same amendment; they maintain that the clause of section 9 (d), above quoted, should be construed as "provided that no legal representative may proceed unless his deceased, if living, would have been entitled to the return of his money or other property."

But the purpose and effect of this entire amendment, including section 9 (d), is evident. Prior to June 5, 1920, no enemy could claim under section 9. Such persons as our own and ally citizens resident in Germany, United States women married to enemies, German diplomats, and interned Germans were enemies as defined in the act. Congress wished to

return the property of such persons and extended the provisions of old section 9, being now section 9 (a), to these classes of enemies by adding section 9 (b) by amendment June 5, 1920.

To remove the doubt whether the provisions of section 9 (b) were sufficient to render possible claims on the part of legatees and distributees of any of these classes of enemies who might have died before their disability to claim was removed by operation of this amendment and doubt as to the proper claimant in such a case, section 9 (d) was added, opening the benefits of section 9 to such legatees and distributees and providing an orderly manner of procedure by application of the "legal representative" of the deceased, who was to distribute to the allowed classes.

If Congress had wished to convey the meaning the appellants advance for 9 (d) it would have been quite easy to state the section accordingly. If Congress had so amended, it would have provided unconstitutionally by limiting the broad remedies under which the act was found constitutional, and in particular the right of any American citizen to obtain any property vested in him prior to the war by inheritance from a German whenever in ignorance of the death or for other reason no letters had been applied for and seizure had been made.

But it is elementary that such a repeal of the existing remedies of section 9 cannot be read in by construction unless section 9 (d) is so repugnant to section 9 (a) and the old section 9, which was the same, that the two cannot stand together or be consistently reconciled.

The purpose of section 9 (d) is clear as an extension and not a restriction on old section 9 as amended to 9 (a), and is,

like section 9 (c), directory as to the procedure to effectuate 9 (b).

SCHUTTE, ADMINISTRATOR, CLAIMS UNDER SECTION 9 (a) AS HE ALWAYS COULD HAVE CLAIMED UNDER OLD SECTION 9. HIS CLAIM IS NEITHER BASED UPON NOR AFFECTED BY ANY PROVISION OF SECTION 9 (d).

Schutte is not an enemy or ally of enemy. Therefore he was always a proper claimant under section 9 prior to amendment and is a proper claimant under section 9 (a) now.

Schutte, administrator, has full legal title to the property in controversy.

"Immediately upon his appointment and qualification an ancillary representative becomes vested with title to all assets belonging to his decedent within the jurisdiction to his appointment and as to such assets his title is exclusive."—24 *Corpus Juris*, sec. 2684.

Under section 9 a holder of bare legal title may proceed as well as a holder of the beneficial title.

"If persons not alien enemies * * * were given no means to protect their interests * * * the seizure would be unconstitutional as without due process of law; but they are given such remedies under section 9. * * * The Alien Property Custodian takes possession subject to the rights of innocent persons * * * the policy holders or creditors may proceed to protect their rights under section 9, or the trustees may do so for them."—*Garvan v. \$25,000 Bonds*, 265 Fed., 477.

Therefore Schutte, administrator, has a perfect and complete claim under section 9 (a), against which we have shown section 9 (d) carries no limitation.

FRTZ SCHUTTE SUPPORTS THE LEGAL RIGHTS OF SCHUTTE, ADMINISTRATOR, WITH RIGHTS OF SUBSTANCE, AND THESE RIGHTS ARE NOT EVEN PRESUMPTIVELY ALTERED BY THE SEIZURE OF THE PROPERTY BY THE CUSTODIAN OR HIS DETERMINATIONS.

Against this clear showing of legal rights of Schutte, administrator, the appellants cite the unreported case of Ramsey, administrator, *v.* Miller, in which no opinion was written, but which apparently holds a court of equity will not enforce rights if bare and proceedings thereunder nugatory. The facts showed administration in that case could effect only payment of taxes which, by specific statute, were payable direct from the Custodian without administration.

"all taxes * * * lawfully assessed by any body politic against money or other property held by the Alien Property Custodian shall be paid out of such money or other property."—Sundry Civil Appropriations Bill Approved July 1, 1918.

Even the appellants note this distinction of the bare legal rights of that case and the rights of substance of this in stating

"Following the decision in the Ramsey case, *supra*, the bill of complaint should have been dismissed as to seven-eighths of the property,"

and do not claim the whole should have been dismissed.

What Fritz Schutte's rights of substance are can be properly determined only on administration under direction of the Surrogate of New York. Had the Custodian wished to act as or appoint an administrator he had full opportunity

to do so. But instead he waived such right in writing annexed to Schutte's petition for letters.

It has been proven that Fritz Schutte is entitled to at least an eighth of the property in controversy, but not that he is not entitled to more. Is he not entitled to such administrator's commissions and reimbursement of expenses as the Surrogate may allow out of the estate on account of these present proceedings that he may obtain his own share clear, less only his proportionate part of expense?

Where a right or interest in property as a right of administration coupled with an interest exists, neither is even presumptively affected by the determination and seizure of the property by the Custodian as enemy owned.

"For the purpose of immediate possession the determination of the Alien Property Custodian is conclusive whether right or wrong * * * the present proceeding (*i. e.*, libel to enforce seizure) gives nothing but the preliminary custody such as would have been gained by seizure. It attaches the property to make sure it is forthcoming if finally condemned and does no more."—*Central Union Trust Company v. Garvan*, 254 U. S., 554.

"The capture is in no sense a condemnation but merely a sequestration * * * by the capture nothing is condemned, nothing confiscated, nothing concluded."—*Kohn v. Garvan*, 263 Fed., 909.

"There is no warrant for saying that enemy ownership must be determined judicially before the property can be seized. * * * The present act commits the determination of that question to the President * * * but it does not make his action final. On the contrary it distinctly reserves to any claimant who is neither an enemy or an ally of enemy a right

to assert and establish his claim by a suit in equity unembarrassed by the precedent executive determination."—*Stoehr v. Garvan*, 255 U. S., 239.

UNDER THE TRADING WITH THE ENEMY ACT THE CUSTODIAN'S MANDATES OVERRIDE STATE LAWS WHEN IN CONFLICT THEREWITH, BUT NOT OTHERWISE, AND COURTS HAVE EFFECTUATED THEM THROUGH CUSTOMARY PROCEDURES WHEN POSSIBLE.

In due procedure the Alien Property Custodian demanded the enemy interest in estates and not estates in which there was an enemy interest, and did not interfere with administration. Common sense demanded this, since the chief beneficiaries of many Germans' estates would be United States citizens, and *vice versa*. Thus *In re Gregg* (Pa., 109 A, 777) the Custodian made demand for the enemy share. From Louis Kohn, trustee under the will of Hirsch Kohn, the Custodian demanded, not the *res*, but the right, title, and interests of the three enemies who beneficially owned the whole (*Kohn v. Garvan*, 263 Fed., 909).

In these cases not an arbitrary but an orderly distribution to the Custodian was made in due form and course of law and after proper discharge of representative functions, and so in the case of *Keppelmann v. Keppelmann*, cited by the appellants. Although enemy beneficial interest in the trust was total, the decree provided, not for an arbitrary delivery by the trustees, but an orderly discharge of their trust by accounting into court, not for delivery of property, but the enemy shares therein.

"Alien Property Custodian is entitled to receive from the complainants the shares which upon dis-

tribution of the assets of the estate in the hands of the complainants would go to (certain named enemy persons) * * * and that the complainants shall account into this court * * * and upon such accounting the clerk of this court do deliver over the said cash so paid into this court to A. Mitchell Palmer as Alien Property Custodian."

The orderly procedure was followed in the case of *Mayer v. Garvan* (270 Fed., 299). Mayer was an American partner in a German firm and proved a partner's lien on firm assets, seized here by the Custodian, for liquidation and separation of his share. The court awarded him the whole of the property for this purpose and decreed the surplus after his satisfaction to be returned to the Custodian. The court did not direct him to prove his own claim and grant award for that amount against the Custodian.

On delivery of this property to Schutte, administrator, any and all rights of the Custodian are safeguarded by the bond required in the decree, and in the further administration under the laws of New York all parties in interest, including Fritz Schutte and the Alien Property Custodian, can participate in due and proper form and receive their awards according to their lawful claims.

The decree of the Supreme Court of the District of Columbia should be affirmed as rendered.

Respectfully submitted,

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Attorneys for Appellees.

